(13)

DEC 24 1945
CHARLES ELMORE CROPLEY
CLERK

UNITED STATES OF AMERICA

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

No. 633

FRANCIS P. SLATTERY,
Petitioner and Appellant,

vs.

ALLAN A. MACDONALD, Sheriff
of Ingham County,
Respondent and Appellee.

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI

KIM SIGLER,
VICTOR C. ANDERSON,
H. H. WARNER,
Attorneys for Respondent and Appellee.
Business Address:
420 Mutual Bldg.,
Lansing, Michigan.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

INDEX

AUTHORITIES CITED

UNITED STATES OF AMERICA
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

No. 633

FRANCIS P. SLATTERY,
Petitioner and Appellant,
vs.
ALLAN A. MACDONALD, Sheriff
of Ingham County,
Respondent and Appellee.

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI

I.

COUNTER-STATEMENT OF MATTER INVOLVED (*)

This counter-statement is deemed necessary in correcting the following inaccuracies and omissions in the statement of the other side (Rule 27, par. 4).

1. On June 11, 1945, this Court denied a petition for a writ of certiorari to the Supreme Court of Michigan herein (89 L. Ed. 1546; No. 1170). A forty-nine page brief was filed in support of that petition, setting up with meticulous elaboration, petitioner's claim that the State of Michigan had denied him due process of law. The

(*) Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed transcript of record.

present petition for writ of certiorari is but a re-statement of the questions previously considered by this Court.

Upon denial of his petition by this Court, petitioner filed a petition for writ of habeas corpus in the District Court of the United States, Eastern District, Southern Division (R. 2, 3, 4, 5, 6). To this petition, respondent filed an answer (R. 11, 12, 13, 14, 15), and added thereto a motion to dismiss.

The matter came on for hearing before Honorable Ernest A. O'Brien, District Judge, at Detroit, Michigan on June 25, 1945 (R. 17 ff.).

After hearing lengthy arguments of counsel, the learned District Judge granted respondent's petition to dismiss the writ of habeas corpus. The Court said in part (R. 47):

> "Of course, it is not necessary for me to even discuss this, but I think Judge Carr showed good discretion and judgment when he said, when he concluded that a man who does not remember whether someone had offered, had solicited a bribe or not, I think those things have to be so uncommon even in Mr. Slattery's life that he would remember it, and I think that was Judge Carr's judgment.
>
> "To do otherwise than dismiss this writ, I would simply sit as a superior supreme court, which I cannot do, of course. I am bound by the Supreme Court of the State of Michigan. They make our law except insofar as it is irreparable to the federal statutes or federal law. Of course, there is no federal statute involved in this litigation.
>
> "I think there is only one course open to me and that is that the motion to dismiss the writ be granted, and it is so ordered."

Petitioner thereafter took appeal to the United States Circuit Court of Appeals for the Sixth Circuit, and on October 17, 1945, that Court filed a Per Curiam Opinion affirming the judgment of the District Court (R. 78, 79).

That Opinion is, in part, as follows:

> "From due consideration of the record on this appeal and the oral arguments and briefs of the attorneys, we are of the opinion that the petitioner has not been deprived of his constitutional rights. The sentence of contempt imposed by the Circuit Court was affirmed on appeal by the Supreme Court of Michigan. In re Slattery, 310 Mich. 458. From the opinion of that Court, it clearly appears that the petitioner was properly convicted and sentenced for contempt of court under a valid state statute. The highest Court of the state held that the fact that the judge of the state Circuit Court was functioning as a one-man grand jury, pursuant to Michigan statutes, at the time the contempt was committed did not divest him of his judicial capacity; and it was pointed out that the Supreme Court of Michigan had in many other cases affirmed convictions for contempt in one-man grand jury proceedings similar to the instant case."

Now again, (this time claiming error by the Circuit Court of Appeals), petitioner seeks review by certiorari to this Court.

2. It is a distortion of fact to assert, as petitioner does, that Judge Leland W. Carr "constituted himself a one-man grand jury to investigate charges of corruption in the Michigan Legislature". Upon the filing of a complaint by the Attorney General of Michigan, Judge Carr proceeded with the one-man grand jury investigation pursuant to the statutory command. (Stat. Ann. 28.943; printed in respondent's brief, page 15).

Counsel's reference to the one-man grand jury investigation as an "inquisitorial proceeding" is one which he has conjured up for his own purposes. Such an expression finds no sanction of statute, of usage in Michigan, and certainly not of propriety.

Neither is there any justification for reference to Hon. Leland W. Carr as an "inquisitor". Reference to the pre-

vious Michigan one-man grand jury cases in which applications for certiorari have been made to the Court[1] will demonstrate this.

The further assertion that grand jury sessions are "sometimes in secret locations away from the court building" is not supported by this record. Such a statement could only be made to cast a false and ominous shadow over proceedings conducted by a most distinguished and respected Michigan jurist.

3. By it's writ of certiorari, the Supreme Court of Michigan directed Hon. Leland W. Carr to certify the proceedings before him in said cause, "but not the proceedings had in grand jury".[2]

The original return of Judge Carr to said writ disclosed that the attitude of petitioner, while being examined before the grand jury, was contemptuous; his answers to questions propounded to him were evasive; that he refused and failed to answer proper questions propounded to him (R. 56).

The return explained that petitioner's request for a copy of his grand jury testimony was denied because it covered

---

[1]McCrea v. Michigan, certiorari denied Apr. 5, 1943, (318 U.S. 783);
Robinson v. Michigan, certiorari denied Dec. 20, 1943, (320 U.S. 799);
Roxborough v. Michigan, certiorari denied Oct. 16, 1944, (89 L. ed. 55); rehearing denied Nov. 13, 1944, (89 L. ed. 94);
Watson v. Michigan, certiorari denied Oct. 16, 1944, 89 L. ed. 55); rehearing denied Nov. 13, 1944, (89 L. ed. 94);
Bommarito v. Michigan, certiorari denied Mar. 5, 1945, (89 L. ed. 684);
Woodson v. Michigan, certiorari denied Mar. 5, 1945 (89 L. ed. 684).

[2]The present record does not contain writ of certiorari issued in this case by the Supreme Court of Michigan on Nov. 10, A.D. 1944. This writ is, however, contained in the former record in this cause when plaintiff sought certiorari to the Michigan Supreme Court (transcript of Record, #1170, Oct. term, 1944, pages 4, 5).

many subjects which could not be disclosed without "seriously interfering with and jeopardizing the work of the grand Jury". That in addition, such testimony was, by statute, privileged (R. 55).

The return of Judge Carr further explained that such part of the grand jury testimony as the court incorporated in it's return to the Supreme Court, was included in order to give the Court a full understanding of "matters leading up to and resulting in the adjudication against petitioner" (R. 65).

The return made by Judge Carr to the Michigan Supreme Court disclosed that the attitude of the respondent upon the stand was contemptuous; that his answers to questions propounded were evasive, and that he repeatedly refused to give answers to proper questions put to him. The return also indicated that such conduct on respondent's part obstructed the work of the court.[3]

---

[3]In re Slattery, 310 Mich. 458, at page 477.

II.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

We believe the following questions are here presented:

1. Was petitioner properly convicted and sentenced for contempt of court under a valid Michigan statute?
2. Does contempt of the one-man grand jury constitute contempt of court under the Michigan statute?
3. Does Section I of the Fourteenth Amendment to the Constitution of the United States limit the pre-existing, inherent power of courts to punish contempts?

III.

REASONS FOR OPPOSING THE ALLOWANCE

The Court below held that petitioner was properly convicted and sentenced for contempt of court under a valid Michigan statute. We believe this application should be denied, because:

1. Petitioner's claims under the Michigan statute here involved have been considered and adjudicated by the highest Court of the State, and this Court has previously declined to review the decision of the Michigan Supreme Court.
2. Decision by the Supreme Court of Michigan was based upon interpretation of a state statute, and no federal question was involved or decided.
3. This Court has held that Section I of the Fourteenth Amendment to the Constitution of the United States (upon which petitioner relies) does not limit the pre-existing inherent power of courts to punish contempts summarily.

IV.

ARGUMENT

Point One

Petitioner was Properly Convicted and Sentenced for Contempt of Court under a Valid State Statute.

The Court below filed a Per Curium Opinion, which was in part as follows (R. 78, 79):

> "From due consideration of the record on this appeal and the oral arguments and briefs of the attorneys, we are of the opinion that the petitioner has not been deprived of his constitutional rights. The sentence of contempt imposed by the Circuit Court was affirmed on appeal by the Supreme Court of Michigan. In re Slattery, 310 Mich. 458. From the opinion of that Court, it clearly appears that the petitioner was properly convicted and sentenced for contempt of court under a valid state statute. The highest Court of the state held that the fact that the judge of the state Circuit Court was functioning as a one-man grand jury, pursuant to Michigan statutes, at the time the contempt was committed did not divest him of his judicial capacity; and it was pointed out that the Supreme Court of Michigan had in many other cases affirmed convictions for contempt in one-man grand jury proceedings similar to the instant case."

Petitioner asserts two false propositions in his argument:

1. That conviction and sentence for contempt were had under the *general contempt statutes* of Michigan. (Petition and Brief, page 10).
2. That petitioner's conviction and sentence for contempt were based *upon perjury alone*. (Petition and Brief, page 5).

The falsity of these two basic propositions will be discussed in the above order.

Petitioner was convicted and sentenced under the contempt section of the one-man grand jury statute. (3 C. L. 1929, Sec. 17219; Stat. Ann. 28.945). *In re Slattery*, 310 Mich. 458, 462. With full realization of this fact, counsel argues that the *general contempt statutes*, (C. L. 1929, Sections 13910-13912) were not complied with. (Petition and Brief, page 10). The contempt section of the one-man grand jury statute, (printed on page 16 of petitioner's present petition and brief), provides:

> "17219. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of contempt and shall be punished by a fine not exceeding one hundred (100) dollars or imprisonment in the county jail not exceeding sixty (60) days or both at the discretion of the court: Provided, That if such witness after being so sentenced shall appear and answer such questions, the justice or judge may in his discretion commute or suspend the further execution of such sentence."

The Supreme Court of Michigan, in affirming conviction herein, held that petitioner was properly convicted under the foregoing statute and that the sentence of sixty days was in accordance therewith. *In re Slattery*, 310 Mich. at pages 462 and 478. Counsel's discussion of the *general contempt statutes* has no legitimate place herein.

Again, counsel would apparently have this Court believe that petitioner was sentenced for contempt of court on the sole ground that he committed perjury in testifying before the court (petition and brief, pages 13 and 14). The present attempt to convince this Court that petitioner's conviction was based *upon perjury alone*, has obviously been stimulated by this Court's pronouncement on November 5, 1945. (In re Michael, 90 L. Ed. 15).

The true basis of petitioner's conviction was stated as follows (In re Slattery, 310 Mich. at page 477):

> "The return of the judge shows that there was evidence indicating that Slattery was obstructing the work of the court by wilfully giving evasive answers. The judge had the advantage of seeing the witness and the manner in which he testified.
>
> "The case is presented to us also on certiorari. The court in its return stated that the attitude of the witness upon the stand was contemptuous, that his answers to questions propounded were evasive and that he refused to give proper answers to the questions put to him."

And on page 478, the Court further said:

> "We have examined the record as submitted to us and we find there is evidence to support the judge's finding."

Petitioner's claim that his summary conviction and sentence for contempt of court was a denial of due process, is bottomed squarely on the claim that Judge Carr, in conducting the one-man grand jury proceedings, *was not acting in a judicial capacity.* The Supreme Court of Michigan answered that claim adversely to petitioner. After reviewing the cases in which a similar claim had been made, the Court concluded: (In re Slattery, 310 Mich. at page 467).

> "So that there may be no further question, we hold that the judge conducting a one-man grand jury proceeding is acting in a judicial capacity."

There is no justification in law nor in fact for the astounding claim that Judge Carr, as a circuit judge, could neither hear nor see what transpired before him as a one-man grand jury; that the contempt committed in the presence of Judge Carr as a one-man grand jury, was not committed in the presence of Judge Carr as a circuit judge.

Mr. Justice Butzel, writing the Michigan Court's opinion for affirmance, unmasked the fallacy of this position when he said (In re Slattery, 310 Mich. at page 478):

> "It was proper for Judge Carr to make the order finding petitioner guilty of contempt, not as a one-man grand jury but as a circuit judge. It would have been an idle gesture for him to have the record of a case in which he had sat, first written up and then submitted to himself."

The Supreme Court of Michigan, in construing the one-man grand jury statute, has consistently held that contempt of the grand jury constitutes contempt of court; that it is punishable under the contempt section of the one-man grand jury statute invoked in the case at bar.

> "There are many other cases wherein we have affirmed convictions for contempt in one-man grand jury proceedings similar to the one in the instant case. See People v. Bommarito, 270 Mich. 455; In re Wilkowski, 270 Mich. 687; In re Schnitzer, 295 Mich. 736; In re Ward, 295 Mich. 742; In re Cohen, 295 Mich. 748." (In re Slattery, 310 Mich. at page 467)

Since the foregoing opinion was written, the Supreme Court of Michigan affirmed conviction for contempt of court in another case arising out of the one-man grand jury proceedings before Judge Carr. *In re Selik*, 311 Mich. 713.

Determination by the Michigan Court of last resort that a circuit judge is acting in a judicial capacity while conducting a one-man grand jury, is based solely upon a construction of the local statute. Construction of a state statute raises a local, rather than a federal question. In *United States ex rel Mazy v. Ragen*, 149 F. 2d, 948, the Circuit Court of Appeals, Seventh Circuit, speaking through Circuit Judge Sparks said, in part, (page 950):

> "(5, 6) There is a further reason why we think the District Court should not have acted to discharge the petitioner here. His decision was based on his construction of the Illinois statute, which, we think, raises

a state or non-federal question rather than a federal one." (decided June 28, 1945; rehearing denied July 13, 1945).

And, In *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, Mr. Justice Brandeis, delivering the Court's opinion, said in part (304 U. S. 78, 82 L. Ed. 1194):

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern * * *."

It is a well established principle that this Court will acquiesce in the construction of state enactments given by state courts of last resort.

> 11 *Am. Juris, Constitutional Law,* Sections 107, 109;
> *Tullis v. Lake Erie & Western R. Co.,* 175 U.S. 348;
> *Hawks v. Hamill,* 288 U. S. 52;
> *Morehead v. New York,* 298 U. S. 587.

In order to raise a question of due process, counsel had to take the position that the contempt was not committed in the presence of Judge Carr as a circuit judge. Since petitioner was admittedly testifying before Judge Carr, it became necessary to assert that Judge Carr was not then acting in a judicial capacity. Counsel argued at length before the Michigan Supreme Court that in conducting the examination, Judge Carr was *not* acting in a judicial capacity. The Michigan Supreme Court held that Judge Carr *was* acting in a judicial capacity, and that as a circuit judge he properly found petitioner guilty of contempt of court. This determination eliminated counsel's basis for claiming violation of due process.

This Court declined to review the opinion of the Michigan Supreme Court. (89 L. Ed. 1546; No. 1170).

The District Court of the United States, (Eastern District, Southern Division) held that the Michigan Supreme Court had passed upon every substantial question raised by petitioner and granted respondent's motion to dismiss the writ of habeas corpus. (R. 47; Order of Dismissal, R. 48).

The United States Circuit Court of Appeals, (Sixth Circuit) affirmed the judgment of the District Court and held that respondent was properly convicted of contempt of court under a valid state statute (R. 78, 79).

Petitioner again seeks certiorari to this Court on the same record as before, except for inclusion of the proceedings in the United States District Court and the United States Circuit Court of Appeals.

We respectfully contend that petitioner's present application for a writ of certiorari presents nothing which this Court has not previously passed on, and that said petition should be denied.

Point Two

There is No Substance in Petitioner's Claim that the State of Michigan Denied him Due Process of Law. (Sec. I, Fourteenth Amendment).

This Court has held that Section I of the Fourteenth Amendment to the Constitution of the United States is not a limitation on the inherent power of courts to punish for contempt.[4]

It was there said:[5]

> "Whether an attachment for a contempt of court, and the judgment of the court punishing the party for such contempt, is in itself essentially a criminal proceeding or not, we do not find it necessary to de-

---

[4]Eilenbecker v. Plymouth County, 134 U.S. 31. (Cited with approval in Camarota v. U. S. 111 F. (2d) 243, page 246; certiorari denied 311 U.S. 651; 85 L. ed. 416).

[5]Opinion, page 39.

> cide. We simply hold that, whatever its nature may be, it is an offense against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury; and that in that sense it is due process of law within the meaning of the Fourteenth Amendment of the Constitution. We do not suppose that that provision of the Constitution was ever intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or of a civil suit."

Thus, the precise constitutional issue which petitioner urges for determination, has been decided adversely to him by this Court.

The claim that inherent power of courts to punish contempts summarily may become an instrument of oppression, was considered by this Court many years ago.[6]

Mr. Justice Harlan, speaking for this Court, there said:

> "It is true, as counsel suggest, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its presence, is one that may be abused and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence, or the necessity of its being lodged in the courts. That power cannot be denied them without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community."

Section I of the Fourteenth Amendment to the Constitution of the United States did not interfere with or abolish the inherent power of the Courts to punish for contempt. Petitioner was not deprived of his constitutional rights by his conviction and sentence for contempt of court.

---

[6]Ex Parte Terry (1888) 128 U.S., at page 309.

V.

CONCLUSION

No Relief

We respectfully urge that respondent was properly convicted of contempt of court under a valid state statute; that he has not been deprived of his constitutional rights, and that certiorari should be denied.

Respectfully submitted,

Kim Sigler,
Special Prosecutor and Asst. Pros. Atty. Ingham County.
Victor C. Anderson,
Prosecuting Atty. Ingham County.
H. H. Warner,
Special Counsel.
Attorneys for Respondent and Appellee.